TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
The Original Contract	4
The Assignment of the Contract	7
The Court Proceedings	13
SUMMARY OF ARGUMENT	16
ARGUMENT	21
1. Attempts to create alienage diversity must be viewed differently from attempts to create out-of-state diversity	23
2. A motive to create or manufacture diversity does not per se oust a federal court of jurisdiction	28
3. The existence of a valid assignment has been established by (a) the controlling law of Texas, (b) the findings of the jury, and (c) the determination of the trial judge	34
4. The execution of an assignment valid under state law, even when done to create diversity jurisdiction, is not collusive or improper within the meaning of 28 U.S.C. § 1359	40
CONCLUSION	52

CITATIONS

Cases:

American Fidelity & Casualty Co. v. All American Bus Lines, 179 F.2d 7 (C.A. 10) 35

Bank of the United States v. Deveaux, 5 Cranch 61 25

Barry v. Edmunds, 116 U.S. 550 ..... 21, 51

Black and White Taxicab Co. v. Brown and Yellow Taxicab Co., 276 U.S. 518 ..... 17, 29, 48

	Page
Blair v. Commissioner, 300 U.S. 5	35
Bradbury v. Dennis, 310 F.2d 73 (C.A. 10)	46, 47, 48, 50
Bullard v. Cisco, 290 U.S. 179	31
Burford v. Sun Oil Co., 319 U.S. 315	24
Central Power & Light Co. v. Purvis, 67 S.W.2d 1086 (Tex.Civ.App.)	36
Chappedelaine v. Dechaneau, 4 Cranch 306	32
Chase National Bank v. Sayles, 11 F.2d 948 (C.A. 1)	37
City of Eufaula, Alabama v. Pappas, 213 F.Supp. 749 (D.C. Ala.)	39
City of Indianapolis v. Chase National Bank, 314 U.S. 63	27
Corabi v. Auto Racing, Inc., 264 F.2d 784 (C.A. 3)	32, 47, 48
County of Todd, Minn. v. Loegering, 297 F.2d 470 C.A. 8)	32
Cross v. Allen, 141 U.S. 528	18, 34, 49
Detroit v. Dean, 106 U.S. 537	47, 50
Dickerman v. Northern Trust Co., 176 U.S. 181	20, 47
Dittman v. Model Bakery, 271 S.W. 75 (Tex.Comm.App.)	36
Durst v. Swift, 11 Tex. 273	18, 38
Erwin v. Barrow, 217 F.2d 522 (C.A. 10)	32
Esposito v. Emery (C.A. 3, unreported, Oct. 2, 1968)	32
F. H. Vahlsing, Inc. v. Hartford Fire Insurance Co., 108 S.W.2d 947 (Tex.Div.App.)	37
Fallat v. Gouran, 220 F.2 325 (C.A. 3)	32
Farmington Village v. Pillsbury, 114 U.S. 138	50
General Office Service Co. v. Ledbetter, 221 S.W.2d 932 (Tex.Civ.App.)	38
Glass v. Carpenter, 330 S.W.2d 530 (Tex.Civ.App.)	18, 38
Globe Indemnity Co. v. Puget Sound Co., 149 F.2d 805 (C.A. 2)	37
Hodgson v. Bowerbank, 5 Cranch 303	24
Hughes v. Dopson, 135 S.W.2d 148 (Tex.Civ.App.)	18, 37

Page

Ishmael v. City Electric of Anchorage, 91 F.Supp. 688 (D.C., Alas.) 35

Jackson v. Twentyman, 2 Pet. 136 24

Jaffe v. Phila. and Western R.R. Co., 180 F.2d 1010 (C.A. 3) 32

Kenedy Town & Improvement Co. v. First National Bank, 136 S.W. 558 (Tex.Civ.App.) 36

Lang v. Elm City Construction Co., 324 F.2d 235 (C.A. 2) 32

Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327 . . . . . 23, 27, 30, 50

Little v. Giles, 118 U.S. 596 50

Lumbermen's Casualty Co. v. Elbert, 348 U.S. 48 25

Martineau v. City of St. Paul, 172 F.2d 777 (C.A. 8) 35

McCoy v. Blakely, 217 F.2d 227 (C.A. 8) 32

McDonald v. Smalley, 1 Pet. 620 29

McSparran v. Weist (C.A. 3, unreported, Oct. 21, 1968). 20, 32, 45, 53

McWhirter v. Otis Elevator Co., 40 F.Supp. 11 (D.C.S.C.) 35

Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 . . . . . 18, 31

Mexican Central R. Co. v. Eckman, 187 U.S. 429 32

Miller & Lux v. East Side Canal & I. Co., 211 U.S. 293. . . 23, 46, 50

Missouri P.R.Co. v. Fitzgerald, 160 U.S. 556 49

Montalet v. Murray, 4 Cranch 46 24

Morris v. Gilmer, 129 U.S. 315 29

Neely v. Grayson County National Bank, 61 S.W. 559 (Tex.Civ.App.) 36

Pang-Tsu Mow v. Republic of China, 201 F.2d 195 (App.D.C.) 24

Pearce v. Wallis, Landes & Co., 124 S.W. 496 (Tex.Civ.App.) 36

Pecos & N.T.R. Co. v. Porter, 156 S.W.2d 267 (Tex.Civ.App.). . . . 36

Petrikin v. Chicago, R.I. & P.R.Co., 15 F.R.D. 346 (D.C. Mo.) 35

Quinn v. McCurdy, 187 S.W.2d 595 (Tex.Civ.App.) 38

Ross v. Smith, 19 Tex. 171 36

Page

Singer v. United States, 323 U.S. 338 47
Smith v. Kernochen, 7 How. 198 46
South Dakota v. North Carolina, 192 U.S. 286. . . . . 17, 28
Sowell v. Federal Reserve Bank, 268 U.S. 449 43
Stephan v. Marlin Firearms Co., 325 F.2d 238 (C.A. 2). 32
Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 33
United States v. Johnson, 319 U.S. 302 . . . . . 48, 49
United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 44
Williams v. Nottawa, 104 U.S. 209 49
Williamson v. Osenton, 232 U.S. 619 . . . . . 17, 29
Young v. Bank of Miami, 161 S.W. 436 (Tex.Civ.App.) 36

Statutes:

28 U.S.C. § 41(1) [1940 ed.] 41
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Judiciary Act of 1789, Sec. 11, 1 Stat. 79 . . . . . 19, 40
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Art. 569 (Vernon's Ann.Tex.Civil Stat.) 36
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Page

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 156

CLAYTON S. KRAMER,

Petitioner,

v.

CARIBBEAN MILLS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

The petitioner Clayton S. Kramer, for the reasons expressed in this brief, respectfully prays that the judgment of the United States Court of Appeals for the Fifth Circuit in this proceeding be reversed.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 392 F.2d 387 and is reprinted

in the Appendix, App. 82. No written opinion was rendered by the United States District Court for the Northern District of Texas; its judgment appears at App. 77.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 26, 1968. See App. 100. A timely petition for rehearing *en banc* was denied on March 5, 1968. The petition for a writ of certiorari was filed on June 3, 1968, less than 90 days after the denial of rehearing. This Court granted certiorari on October 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether federal diversity jurisdiction can be created by a lawful assignment of a money claim to a plaintiff.

2. Whether the assignment of a money claim is "improper" or "collusive" within the meaning of 28 U.S.C. § 1359 where (a) the assignment is legal under state law and (b) one motive for the assignment is to gain access to the federal court by creating diversity of citizenship as specified in 28 U.S.C. § 1332(a)(2).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

> *§ 1359. Parties collusively joined or made*
>
> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

STATEMENT OF THE CASE

The petitioner Clayton S. Kramer, as a citizen and resident of Texas, brought suit against the respondent Caribbean Mills, Inc., a Haitian corporation, in the United States District Court for the Northern District of Texas. Jurisdiction was grounded on 28 U.S.C. § 1332(a)(2), which grants original jurisdiction to federal district courts of all civil actions where the matter in controversy exceeds the sum of $10,000 and is between "citizens of a State, and foreign states or citizens or subjects thereof..".

Alleging a complete breach of an installment contract that had been assigned to him by the Panama and Venezuela Finance Company, a Panamanian corporation, Kramer sought to recover the total amounts due under the contract, $165,000, plus costs and interest. Following a jury trial, the District Court entered judgment in favor of Kramer for the amounts sought. But the Court of Appeals for the Fifth Circuit reversed. It held that, by virtue of 28 U.S.C. § 1359, the District Court had been ousted of jurisdiction inasmuch as the assignment of the contract to Kramer was "collusive" and "improper" and "was made for the purpose of creating federal jurisdiction without divesting the assignor [Panama and Venezuela Finance Company] of his interest in the law suit." App. 85.[1] Concededly, the District Court would have had no jurisdiction over a suit between the two alien corporations that were signatories to the contract.

---

[1] In this brief, "App." references relate to the Appendix printed for use of this Court; "R." references are to the Printed Record before the Court of Appeals for the Fifth Circuit, which has been certified to this Court; references are also made to certain exhibits (e.g., Pl. Ex. 1), the originals of which have been certified and filed with the Clerk of this Court.

The Original Contract

Among the original founders and stockholders of Caribbean Mills, Inc., the respondent herein, was one Roy B. Kelly of Washington, D.C.[2] In 1957, Kelly and certain other stockholders entered into an understanding which granted to Kelly a so-called "continuing economic interest" in the nature of a net profits interest tied to earnings of this corporation, such interest to commence only after the construction indebtedness of a certain new flour mill had been retired. Pl. Ex. 1. Kelly also served as president of Caribbean Mills for several years. R. 155.

As of 1959, Kelly owned an 80% interest in this "continuing economic interest." In addition, he held a certificate representing 125 shares of stock of Caribbean Mills. Panama and Venezuela Finance Company also asserted an interest in this certificate, having earlier received the 125 shares of stock as a pledge for a loan of money to Kelly and having foreclosed on those shares when Kelly defaulted on repayment of the loan. R. 318-319, 292-293, 320-321.

In the meantime, virtually all of the capital stock of Caribbean Mills had been acquired by Clint Murchison and others of his family with the exception of the 125 shares held by Panama as the result of the Kelly pledge. Murchison and Kelly fell into disagreement and Murchison wanted Kelly out of the Caribbean Mills operation. Several attempts were made to purchase Kelly's interest, culminating in an agreement dated May 30, 1959, and made effective on June 4, 1959. On the day preceding the execution of that agreement, Kelly by letter and in consideration of Panama's "execution of the proposed agreement tomorrow," assigned to Panama "all of my right, title and interest to the $165,000" that was to be paid in installments under the proposed tri-

---

[2] Caribbean Mills, Inc., was incorporated under the laws of Haiti, using the name and style of Societe Haitienne de Minoteria, S.A. Its name was later changed to Caribbean Mills, Inc. It is a manufacturer of flour and by-products. App. 70. It operates a flour mill in Port-au-Prince in Haiti. R. 99.

partite agreement. R. 30. Without such an assignment, Panama would not have entered into the agreement.

This tripartite agreement, entered into by Caribbean Mills, Kelly and Panama, constitutes Pl. Ex. 1 and provides in pertinent part as follows:

(1) Kelly and Panama, representing that they had full power to do so, assigned and transferred to Caribbean Mills the certificate evidencing the 125 shares of stock.

(2) Kelly, representing that he was the sole owner of the 80% interest in the so-called "continuing economic interest," transferred and assigned that 80% interest to Caribbean Mills.

(3) Kelly and Panama agreed to deliver to Caribbean Mills the 125 shares of stock at the closing of the transaction.

(4) Caribbean Mills agreed that it would pay to Kelly and/or Panama "at such place as they, jointly, shall designate" the sum of $250,000. Of that amount, $85,000 was to be paid on the closing date of the agreement and the remaining $165,000 was to be payable in twelve annual installments of $13,750 each, "the first such installment to be due and payable on June 1, 1962, and a like installment to be due and payable on June 1 of each year thereafter until the full sum of One Hundred Sixty-Five Thousand Dollars ($165,000.00) shall have been fully paid."

(5) It was further agreed that Kelly and Panama were acting jointly with respect to this contract and that the settlement of affairs between them was not a matter with which Caribbean Mills was concerned. Caribbean Mills was acknowledged to have the right to disburse the $85,000 by its check payable to Kelly and Panama, jointly.

(6) With reference to a prior loan to Kelly by one Sid Richardson for the purchase of stock in Kirby Petroleum Co., it was agreed that Caribbean Mills would cause Kelly's promissory notes to Richardson to be refinanced so as to

be due and payable at a later date. It was also agreed that Kelly would execute a renewal promissory note, payable to Richardson and reflecting the outstanding balance and accrued interest; as security for that renewal note, Kelly agreed to pledge, transfer and assign to Richardson all of Kelly's right, title and interest in the instant agreement. Panama, of course, was not a party to this portion of the agreement.

(7) The agreement was declared to be in full and final settlement of all claims of any kind by or between Caribbean Mills, on the one hand, and Kelly and/or Panama, on the other hand. The agreement was further declared to be binding upon Caribbean Mills and "its predecessors, successors and assigns," as well as upon "Roy B. Kelly, his heirs, successors, adminstrators or personal representatives or assigns, and Panama and Venezuela Finance Company, its successors or assigns."

The contract was duly signed by these three parties, Walter M. Spradley signing as vice-president of Caribbean Mills, Roy B. Kelly signing for himself, and Eduardo Alfaro signing as president of Panama and Venezuela Finance Company. On June 4, 1959, the closing date of the contract, Caribbean Mills duly paid the first installment of $85,000 in a draft payable to Kelly.

Subsequently, in 1961, and before any of the remaining $165,000 installment payments became due, the Murchison family acquired from Richardson the Kirby Petroleum Co. stock in question, as well as Kelly's agreement to pledge and transfer to Richardson all of his right, title and interest under the tripartite agreement of May 30, 1959. Allegedly, Caribbean Mills thereby acquired its agreement to pay the $165,000 for the sum of $55,626.20. R. 256-259, 273. No notice was given to Panama and Venezuela Finance Co. of any of these events. R. 255.

The Assignment of the Contract

In accordance with the terms of the foregoing contract, the first installment payment of $13,750 accrued and became due on June 1, 1962. In July of 1962 Panama and Venezuela Finance Company requested payment of that amount. Such payment was refused by Caribbean Mills despite repeated demands. App. 4. Subsequent annual installment payments have likewise not been made. The reasons for such defaults are disputed but are not here relevant.

Thereafter, on September 21, 1964, Panama and Venezuela Finance Company executed an assignment of all its right, title and interest in the aforesaid contract, "including all actions, causes of actions, claims, right to make demands, right to designate place of performance and payment, [and] monies due and/or to become due" under that contract. App. 13-14. The assignee was one Clayton S. Kramer, identified in the assignment as "of Wichita Falls, Wichita County, Texas." App. 13. The consideration for the assignment was stated to be "One Dollar ($1.00) and other good and valuable consideration, receipt of which is hereby acknowledged." App. 13. The assignment stated that it was "made under the laws of the State of Texas" and in the event of any question as to the validity of the assignment "it shall be construed and governed by the laws of the State of Texas, and the powers, duties and benefits flowing hereunder to the said Clayton S. Kramer shall be controlled by the laws of the State of Texas." App. 14. The full text of the assignment was as follows (App. 13-14):

> Assignment of Sept. 21, 1964
>
> Know All Men By These Presents:
>
> That we, the undersigned Panama and Venezuela Finance Company, a Panamanian Corporation, for and in consideration of One Dollar ($1.00) and other good and valuable consideration, receipt of which is hereby acknowledged, does hereby assign, sell and convey to Clayton S. Kramer of Wichita Falls, Wichita County, Texas, all of our right, title and interest,

including all actions, causes of actions, claims, right to make demands, right to designate place of performance and payment, monies due and/or to become due, arising from or out of a certain agreement and contract in writing, dated June 4, 1959, between Caribbean Mills, Inc., a Haitian Corporation, Roy B. Kelly of Washington, D.C. and Panama and Venezuela Finance Company, under which contract or agreement Caribbean Mills agreed to pay to Panama and Venezuela Finance Company and/or Roy B. Kelly the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) on such terms and at such times as were more fully set out in said instrument, a copy of which is attached hereto as Exhibit A, and fully incorporated herein by reference. This assignment specifically includes another certain agreement, made in connection with the original agreement heretofore described, such other agreement being a collateral agreement and contract of Murchison Brothers and others, dated on or about June 4, 1959, a copy of such agreement is also attached hereto as Exhibit B, and fully incorporated herein by reference.

Panama and Venezuela Finance Company warrants to Assignee herein that it is the owner of and entitled to all benefits arising by virtue of the agreements and/or contracts herein assigned and has the right to make this assignment of the same.

It is agreed that this assignment to the said Clayton S. Kramer is made under the laws of the State of Texas, and in the event that there is any question of validity of such assignment, it shall be construed and governed by the laws of the State of Texas, and the powers, duties and benefits flowing hereunder to the said Clayton S. Kramer shall be controlled by the laws of the State of Texas.

That I, the undersigned officer of Panama and Venezuela Finance Company am specifically authorized and empowered to make such assignments to Clayton S. Kramer and such contract for Panama and Venezuela Finance Company herein.

Made and executed on this the 21st day of Sept., A.D. 1964.

PANAMA AND VENEZUELA
FINANCE COMPANY,
By E. Alfaro.

Simultaneously with the execution of this assignment, Kramer and Panama entered into a collateral agreement whereby Kramer agreed to "pay solely as a Bonus to Panama and Venezuela Finance Company, or anyone properly designated by it in writing, a sum equal to 95 per cent of the net proceeds or monies obtained from Caribbean Mills, Inc., or others," by virtue of the assigned contract. App. 15. This 95 per cent "bonus" was to be calculated on a net basis, following the payment of attorney fees and expenses of litigation, and the remaining 5 per cent was for Kramer's "own use and benefit." App. 16. The attorney fees were not to exceed one-third of any gross recovery obtained from Caribbean Mills or others. App. 16. This collateral agreement read in full as follows (App. 15-16):

Agreement of Sept. 21, 1964

STATE OF TEXAS
COUNTY OF WICHITA:

KNOW ALL MEN BY THESE PRESENTS: That we, Panama and Venezuela Finance Company, a Panamanian corporation, and Clayton S. Kramer, do hereby agree and contract as follows:

WHEREAS, previously the Panama and Venezuela Finance Company, for valuable consideration, by instrument in writing, irrevocably assigned, sold and conveyed to Clayton S. Kramer all of its right, title and interest under and arising out of a certain contract or agreement closed June 4, 1959, between Panama and Venezuela Finance Company, Caribbean Mills, Inc., and Roy B. Kelly, together with an assignment of a connected agreement dated on or about June 4, 1959, from Murchison Brothers and others; and,

WHEREAS, the said Clayton S. Kramer is now the sole owner of any action or causes of action derivative therefrom, with the independent right of management, control and prosecution thereof, and does hereby indemnify and hold harmless the Panama and Venezuela Finance Company from any cost or expense that has or may arise out of the prosecution of any demand or suit on said contracts; and,

WHEREAS, the said Clayton S. Kramer agreed to make demand on said contracts and collect or prosecute to final Judgment all claims thereon; it is hereby collaterally Agreed, that in the event of payment to or recovery on said contracts by Clayton S. Kramer, he will pay solely as a Bonus to Panama and Venezuela Finance Company, or anyone properly designated by it in writing, a sum equal to 95 per cent of the net proceeds or monies obtained from Caribbean Mills, Inc., or others, under or by virtue of the contracts heretofore assigned to the said Clayton S. Kramer, it being understood by the parties hereto, that the said Clayton S. Kramer shall have the right to employ attorneys on a contingent fee basis, paying to such attorneys an amount not to exceed thirty-three and one-third per cent (33 1/3%) of the gross recovery obtained from Caribbean Mills or others, and to pay expenses of litigation not to exceed one-half (1/2) the total of such expenses. In other words, after the payment of attorney fees and expenses, Clayton S. Kramer is to pay to Panama and Venezuela Finance Company or its order, ninety-five (95 per cent of the remainder of the net recovery, if any, and retain five (5) per cent for his own use and benefit.

This contract and agreement by and between the parties hereto is made and is to be performed in the State of Texas; that the same was drawn by the parties with reference to the laws of the State of Texas, and it is hereby specifically contracted and agreed that in the event of any controversy, dispute or litigation relating to or arising out of this instrument, the laws of the State of Texas specifically control.

In consideration of our mutual promise and consideration with which this instrument passes, we set our hands hereunto on this the 21st day of Sept, A.D. 1964.

/s/ Clayton S. Kramer
Clayton S. Kramer

PANAMA & VENEZUELA
FINANCE COMPANY

By E. Alfaro

Kramer is an attorney, whose principal business is the practice of law in Wichita Falls, Texas. App. 30. He testified at the trial that the early summer of 1964 was the first time he had learned of the May 30, 1959 contract that was thusly assigned to him. App. 32. He heard of this contract and the claim thereunder from another Wichita Falls attorney, Jack Banner, who has represented Kramer at all stages of this litigation. Banner at that juncture was briefing a legal point concerning the prosecution or enforcement of the unpaid obligation under the contract. App. 36. Kramer advised Banner that he was interested in acquiring the claim, knowing that none of the installment payments had been made. App. 36-37. Kramer recognized the possibility that legal action might be necessary to collect on the claim. App. 54. But at the time of the acquisition of the contract there was no conversation between Kramer and Banner as to the necessity of filing suit in order to enforce the contract. App. 60-61. Kramer, moreover, did not know whether Banner had had any discussions with Panama with respect to the institution of any such suit in a federal court. App. 59.

Kramer himself had no direct contact with Panama and had no participation in or personal knowledge of the events leading to the execution of the contract of May 30, 1959. App. 61, 67. At no time did he personally communicate with any persons connected with Panama, either before or after the institution of this action. App. 64-65. And at no time did Panama exercise any control, management, or super-

vision of the means or manner in which Kramer handled or prosecuted the claim under the contract. App. 60.

With respect to the collateral agreement to pay the 95 per cent "bonus" to Panama,[3] Kramer testified (App. 45) that

> "I told Mr. Banner that I did not want to put up any cash to purchase the claim, that I did not—that I would prefer not to borrow a large sum of money for it. On the other hand, I wanted a claim that was clear with no strings attached, that I wouldn't have to answer to anyone else for, and I don't know who brought it up, but ultimately I told Mr. Banner, 'I don't want the assignment messed up,' but I would give him a bonus."

He further testified (App. 57) that

> "I did obligate myself to Panama-Venezuela Finance Company to use my best efforts to handle and prosecute the claim. However, if I didn't want to put a lot of money into it, I didn't want to go into hock the rest of my life for it—at the same time I didn't expect them to just completely sit there and say, 'Take it all for the $1 plus your promises to prosecute the claim, plus your indemnity agreement,'—I finally told Jack [Banner], or Jack and I talked it over and decided that was one way to do it—was by paying a bonus, and I thought that that

---

[3]The amended complaint in this case made no reference to this collateral agreement, referring rather only to the assignment. App. 4. The amended answer and the motion to dismiss, while asserting that Kramer was not a real party in interest and that he had been collusively made a plaintiff "by virtue of a purported assignment" in order to invoke diversity jurisdiction, also made no reference to the collateral agreement. App. 6, 10. Prior to filing that answer and motion, the respondent Caribbean Mills sought, by deposition, to inquire of Kramer as to the details of this collateral agreement. At first Kramer refused to answer such questions on advice of counsel. But by obtaining a court order to compel such answers (see App. 20), the respondent obtained full answers in the resumed deposition. Kramer testified fully at the trial concerning this agreement. App. 42-69.

was fair, but the bonus—this collateral agreement was to have nothing to do with the assignment."

Kramer's consideration of the terms of this collateral agreement was derived solely from conversations with Banner, which included some discussion of whether the "bonus" figure should be 90 or 95 per cent. App. 46. At this point Banner began to act as Kramer's counsel and in that capacity negotiated the terms of both the assignment and the collateral agreement with Panama. App. 46-47.

Kramer further testified that he had paid to Panama the $1.00 that was recited as the consideration for the assignment and that he had paid certain expenses in connection with the litigation. App. 47. He also entered into a formal retainer agreement with the law firm of which Banner was a member, agreeing to pay that firm one-third of the total recovery obtained from Caribbean Mills "whether by judgment, settlement or otherwise." App. 18-19. Under that agreement, Kramer agreed to reimburse the firm for any expenses other than ordinary office expenses, the firm retaining the right to determine whether an appeal should be taken from any unfavorable judgment. App. 19.

Following the execution of the assignment and the collateral agreement, a demand was made of Caribbean Mills on behalf of Kramer for the payment of the monies due under the contract. This demand was ignored. Neither at this point nor at any time prior thereto was anything said to Kramer respecting the filing of a suit in a federal court. App. 58-59. But after the demand had been rejected "there was some talk about the suit, or, I believe we discussed where it would be filed, which Court, but that was shortly before suit was filed." App. 59.

The Court Proceedings

The complaint in this proceeding was originally filed in November of 1964 in the United States District Court for the Northern District of Texas, Wichita Falls Division. App. 1. In amended form, the complaint was refiled with per-

mission of the court in the Dallas Division of the Northern District of Texas on February 5, 1965. App. 2. The amended complaint alleged that (1) Kramer was a citizen and resident of Texas, while Caribbean Mills was a foreign corporation organized under the laws of Haiti and having a place of business in Dallas, Texas, (2) this was a suit for debt arising out of the contract dated May 30, 1959, which was summarized, (3) all rights of Kelly in that contract had been transferred to Panama, which in turn had assigned and delivered its entire interest in the contract to Kramer, (4) Kramer had designated a place of payment and had demanded payment of the installments, and (5) Caribbean Mills had refused to pay any of the installments and denied all liability therefor, thus constituting a complete breach of the agreement and causing all obligations thereunder to become immediately due and payable. Judgment was accordingly sought in the sum of $165,000, together with costs and 10 per cent interest from and after June 1, 1962. App. 5.

This complaint was duly served upon Caribbean Mills through its vice president, Walter M. Spradley, at his office in Dallas, Texas. Prior to trial, the District Court overruled a motion to dismiss the action for lack of jurisdiction over the person of the defendant corporation and to quash the return of service. That action by the court reflected the evidence adduced that demonstrated that Caribbean Mills had more than minimum contacts with the jurisdiction in question and was actually doing business in the Northern District of Texas. Among such contacts with the Northern District of Texas were the residence of several of the corporate officers, the maintenance of corporate bank accounts, the borrowing of money from banks, the execution and signing of contracts, and the conduct of certain other corporate business. App. 70-76.

The amended answer filed by Caribbean Mills denied that it had any obligation to make further payments under the May 30, 1959, agreement and alleged that it had acquired from Roy B. Kelly all the right to sums due and payable thereunder. App. 6-9. The answer further asserted that the

District Court lacked jurisdiction "in that Clayton S. Kramer is not the real party in interest, and by virtue of a purported assignment, Clayton S. Kramer has been improperly or collusively made Plaintiff in this cause to invoke the diversity jurisdiction of this Court, which would not otherwise be present." App. 6. This latter assertion, making specific reference to 28 U.S.C. § 1359, was repeated in a motion to dismiss, filed simultaneously with the answer. App. 10.

Following a hearing on the motion to dismiss, the District Court overruled the motion, "being of the opinion that the Defendant's Motion to Dismiss the Action for the reason that Clayton S. Kramer was improperly and collusively made the Plaintiff in this suit for the purpose of invoking the diversity jurisdiction of this Court, should be overruled, in that the assignment from Panama and Venezuela Finance Company to Clayton S. Kramer was good on its face." App. 12.

A jury trial on the merits of the cause of action thereafter ensued. Various special issues were submitted to the jury, and among its answers to the special interrogatories were the following:

(1) Roy B. Kelly did assign to Panama all of his interest in the agreement of May 30, 1959, except for any interest he had in the $85,000 cash payment. App. 77.

(2) Panama did assign all its interest in that agreement to Clayton S. Kramer. App. 78.

(3) Panama's interest in the agreement at the time of the assignment to Kramer amounted to $165,000. App. 78.

(4) The parties to the agreement did not intend, at the time of executing the agreement, that the $165,000 in payments would be subject to and pledged as security for Kelly's indebtedness to Sid Richardson. App. 78.

(5) Panama executed the agreement believing it to be the full and only agreement between Kelly, Caribbean Mills and Panama. App. 79.

(6) Caribbean Mills did intentionally omit matters from the agreement and failed to inform Panama of that omission. App. 80.

The District Court, in light of these jury answers and the testimony and evidence at the trial, found that the plaintiff Kramer was entitled to receive judgment against Caribbean Mills for $165,000. App. 81. Judgment for that amount was entered, together with court costs and 6% interest from the date of judgment until full payment of the $165,000. App. 81.

That judgment was reversed by the Court of Appeals on its determination that the assignment was collusive and hence deprived the District Court of jurisdiction under 28 U.S.C. § 1359.

SUMMARY OF ARGUMENT

The basic question is whether a party has been "improperly or collusively made or joined to invoke the jurisdiction of such court," thereby ousting the federal court of jurisdiction under 28 U.S.C. § 1359, where the party's status is the result of a lawful assignment of a contract and a cause of action thereunder. It is here conceded that, while the petitioner himself had his own reasons for acquiring the contract and cause of action, such assignment was in substantial part motivated by a desire by counsel to make diversity jurisdiction available should it subsequently be determined that the suit be brought in a federal rather than a state court.

1. Significantly, this case does not involve an attempt to invoke ordinary diversity jurisdiction over matters in controversy between "citizens of different States." 28 U.S.C. § 1332(a)(1). Rather it involves the alienage provision of § 1332(a)(2), conferring jurisdiction where the matter in controversy is between "citizens of a State and foreign states or citizens or subjects thereof." The original parties to the assigned contract in this case both being aliens, the federal court would have had no jurisdiction to entertain a

suit between them. And the assignment of the contract by one of those aliens to a citizen of Texas was designed, in compliance with state law, to invoke the alienage diversity jurisdiction of the federal court under § 1332(a)(2).

The fact that the alienage diversity provision underlies the effort to invoke federal jurisdiction has several important consequences: (a) the original controversy between the two aliens is not so intimately a matter for state court adjudication as is a matter between citizens of the same state; (b) an effort to create alienage diversity does not carry with it any marks of a device to wrest from state courts a jurisdiction that necessarily belongs there; (c) the presumed prejudice of state courts against litigants from distant parts of the country obviously reaches its peak as to alien, out-of-the-country litigants; (d) the need and justification for the assertion of federal court jurisdiction spring from this element of prejudice and hence are at their height in the alienage context; and (e) since there are relatively few controversies arising in this country between aliens, there is no danger of overloading federal court dockets with suits of this nature if legitimate and bona fide efforts to invoke alienage diversity jurisdiction are permitted.

2. The mere fact that there was a motive in this instance to create and invoke alienage diversity jurisdiction does not operate *per se* to oust a federal court of jurisdiction. Indeed, the repeated decisions of this Court have established that such a motive to create jurisdiction is entirely irrelevant if the factors utilized to create that jurisdiction are in themselves lawful and proper.

This Court has recognized the propriety of creating or manufacturing federal jurisdiction in a variety of situations, including the invocation of this Court's original jurisdiction (*South Dakota v. North Carolina*, 192 U.S. 286), the invocation of diversity jurisdiction through change of domicile (*Williamson v. Osenton*, 232 U.S. 619), the invocation of diversity jurisdiction through corporate realignments and transfers of assets (*Black and White Taxi Co. v. Brown and*

Yellow Taxi Co., 276 U.S. 518), and the invocation of diversity jurisdiction through such other devices as transfers of land or contracts or the selective naming and omission of parties to a class action or a stockholders' derivative suit. Efforts to defeat diversity jurisdiction through the appointment of an administrator or guardian of the same state citizenship as that of the other party to a suit have also been recognized (*Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183). In all of these instances, the devices used were lawful and bona fide, thus making irrelevant the fact that the motive underlying the devices was directed toward creating federal jurisdiction.

In short, if the transaction, transfer or assignment be in itself valid and lawful "it makes no difference that by such transaction the transferee acquired the advantage of suing in the federal court." *Cross v. Allen*, 141 U.S. 528, 533.

3. The existence of a valid assignment in this case has been established by the controlling law of Texas, the findings of the jury and the determination of the trial judge.

Under Texas law, which was made controlling by the terms of the assignment, an assignment is deemed complete and valid where (a) the parties intend to transfer the rights of the assignor, and (b) there is a delivery of the assignment instrument, either actual or symbolic. Such an intent and delivery are sufficient to transfer title and to evidence a bona fide assignment even though the assignee may have paid no consideration. Texas thus follows the general rule that the assignment of an entire chose in action is valid and irrevocable after delivery though made without consideration. *Hughes v. Dopson*, 135 S.W.2d 148, 149-150 (Tex. Civ. App.). Moreover, in a suit between the assignee and the original obligor under the assigned contract, the question of consideration for the assignment or the adequacy of such consideration is entirely irrelevant and cannot be the subject of inquiry. *Durst v. Swift*, 11 Tex. 273; *Glass v. Carpenter*, 330 S.W.2d 530, 537 (Tex. Civ. App.).

In this case, the intent to transfer Panama's entire interest in the original tripartite agreement to the petitioner Kramer was perfectly clear, and delivery of the assignment instrument was made. While consideration for the assignment was not necessary under Texas law and cannot be inquired into by an obligor like the respondent Caribbean Mills, there was more than adequate consideration for the assignment in this case: (a) the payment of "One Dollar and other good and valuable consideration"; (b) the assumption by Kramer of the management, control and burden of any lawsuit; (c) the promise by Kramer to indemnify Panama for any obligations arising out of enforcement of the contract; and (d) the deferred "bonus" payment to Panama of 95 per cent of the net proceeds of any recovery by Kramer. As a result, all of Panama's rights in the original tripartite agreement were irrevocably assigned to Kramer and Panama had no control whatever over any lawsuit Kramer might decide to institute.

Moreover, upon a consideration of all the documents and facts, including those involving the collateral agreement and the 95 per cent "bonus," the jury on proper instructions and in response to special interrogatories found that Panama did in fact assign all of its $165,000 interest in the tripartite agreement to Kramer. And the trial judge, after a full consideration of these documents and facts, ruled that the assignment "was good on its face" and that Kramer had not thereby been "improperly and collusively made the Plaintiff in this suit for the purpose of invoking the diversity jurisdiction of this Court." App. 12.

4. Section 1359 of Title 28, United States Code, is a creature of the 1948 revision of the Judicial Code. As part of that revision:

(a) The famous assignee clause, dating back to the Judiciary Act of 1789, was eliminated.

(b) Also eliminated was the first portion of Sec. 5 of the Act of March 3, 1875, which directed the dismissal of a suit whenever it appears "that such suit does not really and sub-

stantially involve a suit or controversy properly within the jurisdiction" of the federal court. This was omitted by the revisers as "unnecessary." But this omission may have removed an important factor in defining the "improperly or collusively" language of § 1359 by eliminating from the concept of collusion the designation of a nominal party who has no real or substantial interest in the controversy, for the purpose of creating diversity. See *McSparran v. Weist*, decided by the Third Circuit on Oct. 2, 1968, No. 772, Oct. Term, 1968.

(c) The second portion of Sec. 5 of the 1875 Act was retained and became what is now designated as § 1359. It provides for dismissal whenever it appears that a party, "by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

This legislative reshuffling, however, did not change the long-standing doctrine that, standing alone and apart from any collusive implementation, a motive to create diversity jurisdiction does not affect or destroy that jurisdiction. If the device utilized to create diversity is lawful and not collusive, § 1359 does not come into operation whatever the motive.

Turning to what lower courts have described as the ambiguous and indefinite words "improperly or collusively," as they appear in § 1359, it is apparent from their plain meaning that some sort of illegal or fraudulent action or impropriety is required to bring the statute into operation. See *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 190. No such illegal or fraudulent action here occurred, the assignment being entirely lawful and not designed to injure the opposing party in any way. And the major purpose of § 1359, to protect the federal courts from frauds perpetrated on their jurisdiction, likewise implies that there be something more than a lawful transaction by which the transferee acquires the advantage of suing in the federal court. There must be something illegal or fraudulent about the transaction, labels which cannot be applied to a transaction that is legitimate under state law.

To the extent that collusion or impropriety may be said to relate to the absence of consideration for an assignment, or the lack of an irrevocable transfer of interest, or the retention by the assignor of control over federal litigation, none of those elements is here present. Equally significant is the fact that the jury and the trial judge both made affirmative determinations that those elements did not here exist and that the assignment was complete and irrevocable. The Fifth Circuit plainly erred in failing to give any weight or respect to those findings. See *Barry v. Edmunds*, 116 U.S. 550.

Finally, if this Court should disagree with the contentions of the petitioner, it is requested that the Court's ruling be made prospective only so that the petitioner will not suffer hardship. To remand him now to whatever remedies he may have in the Texas courts would subject him to the loss of installment payments that have accrued and could not now be recovered in a suit instituted after the limitations period has expired.

ARGUMENT

The central issue in this case is whether the making of a lawful assignment of a contract and a cause of action thereunder, an assignment motivated in substantial part by a desire to create the basis of alienage diversity jurisdiction, collides with the provision of 28 U.S.C. § 1359 that a federal district court "shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

The petitioner concedes that the assignment was in part arranged by counsel in order to make diversity available should it subsequently be determined that the suit be brought in a federal rather than a state court. But the petitioner does not concede that this federal jurisdictional problem was the sole motive for the assignment. At the time

the assignment was made, a decision had not been reached as to the court in which suit would be instituted. And the record in this case affirmatively establishes that prior to and quite apart from any determination to bring this suit in the federal court the petitioner Kramer had become interested for his own reasons in acquiring the contract claim. App. 36-37, 60-61. But of far more significance than motive is the fact that he acquired the claim in a manner that validated the assignment under state law. Motive thereby became irrelevant.

The existence of that lawful assignment was further attested to by the jury finding, derived from a preponderance of all the evidence concerning the circumstances relative to the assignment, that "Panama and Venezuela Finance Company assigned all its interest, if any, under the May 30, 1959 Agreement to Clayton S. Kramer." App. 78. And the District Court, likewise reviewing those circumstances at a full hearing on the matter, concluded that the assignment "was good on its face" and that Kramer had not been "improperly and collusively made the Plaintiff in this suit for the purpose of invoking the diversity jurisdiction of this Court." App. 12.

It is against this background of state law and of determinations by judge and jury that the central issue in this case must be assessed. In a word, that background establishes that a legitimate decision was made to bring this action in a federal court, a decision made possible by a lawful and effective assignment of a cause of action. Such a decision bears none of the earmarks of an attempt to invoke diversith jurisdiction by "improperly or collusively" joining or making as the party plaintiff the assignee of that cause of action.

1. Attempts to create alienage diversity must be viewed differently from attempts to create out-of-state diversity.

Significantly, this is not an ordinary diversity case nor one in which an attempt was made to create ordinary diversity jurisdiction—i.e., the jurisdiction conferred by 28 U.S.C. § 1332(a)(1) over matters in controversy exceeding $10,000 between "citizens of different States." Rather it involves the alienage provision of § 1332(a)(2), conferring jurisdiction where the matter in controversy is between "citizens of a State, and foreign states or citizens or subjects thereof."

So identifying the type of diversity jurisdiction here sought to be created is an important predicate to the questions raised in this case. Much of what has been said, judicially and otherwise, about the evils of manufacturing diversity jurisdiction impliedly or overtly assumes that federal courts should be protected from attempts to invoke jurisdiction over matters that truly are controversies between citizens of the same state and that should be determined by the courts of that state. In *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 342, for example, a collusive scheme to create diversity jurisdiction was condemned as a "plan . . . to wrest the judicial determination of the present controversy from the courts of the state in which the land lies." And in *Miller & Lux v. East Side Canal & I. Co.*, 211 U.S. 293, 303, the device condemned was one "by which to have the rights asserted by the California corporation in a state court determined by the Federal court rather than by the state court."

But a suit between two alien parties, unlike a suit between two citizens of the same state, is not one that necessarily or even preferably belongs in a state court, even assuming the jurisdictional requisites of a state court suit can be satisfied. Indeed, "it has never made any difference where the suit is brought, and probably should not, since there may be a real danger of prejudice, in any forum, against the alien." Wright, *Federal Courts* 70 (1963). Hence any effort

to create an alienage type of diversity does not carry with it any marks of a device to wrest from state courts a jurisdiction that properly belongs there.

True enough, the federal courts have never been given jurisdiction over a suit between two aliens. *Montalet v. Murray*, 4 Cranch 46; *Hodgson v. Bowerbank*, 5 Cranch 303; *Jackson v. Twentyman*, 2 Pet. 136; but cf. *Pang-Tsu Mow v. Republic of China*, 201 F.2d 195, 198-199 (App. D.C.). Nor have they been given jurisdiction over suits between citizens of the same state involving local causes of action. But it is principally the latter type of lawsuit that Congress and the federal courts have steadfastly sought to exclude from the federal jurisdictional ken. The primary thrust of what is generally called federal diversity jurisdiction is to permit local law controversies in the federal courts only where the real parties are truly citizens of different states. As Mr. Justice Frankfurter stated in his dissenting opinion in *Burford v. Sun Oil Co.*, 319 U.S. 315, 336-337:

> "The reasons which led Congress to grant such jurisdiction to the federal courts are familiar. It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim. To avoid possible discriminations of this sort, so the theory goes, a citizen of a state other than that in which he is suing or being sued ought to be able to go into a wholly impartial tribunal, namely, the federal court sitting in that state. Thus, the basic premise of federal jurisdiction based upon diversity of the parties' citizenship is that the federal courts should afford remedies which are coextensive with rights created by state law and enforceable in state courts."

Thus it is that the "stuff of diversity jurisdiction is state litigation" and that the "availability of federal tribunals for controversies concerning matters which in themselves are outside federal power and exclusively within state authority,

is the essence of a jurisdiction solely resting on the fact that a plaintiff and a defendant are citizens of different States." *Lumbermen's Casualty Co. v. Elbert*, 348 U.S. 48, 54 (concurring opinion of Mr. Justice Frankfurter). Somewhat different considerations must have motivated the constitutional and legislative creation of federal jurisdiction over suits between an alien and a citizen of a state, as now embodied in § 1332(a)(2). Presumably, the possibility of state court discrimination against an alien was considered even greater and more likely than the possibility of discrimination against a citizen of another state.[4] And while federal courts are not permitted to adjudicate disputes between two aliens, the possibility of state court prejudice against one or both aliens would obviously be at the zenith in such a situation.

In terms of possible discrimination, therefore, to inveigh against devices to create diversity of citizenship in a suit that is really one between citizens of the same state is to remand the parties to their remedies in a state court where the potential of out-of-state discrimination cannot exist as between the true parties. But outlawing an attempt to create alienage diversity where both of the original parties are aliens remands those parties to a forum where the potential of discrimination—the hallmark of the need for federal diversity jurisdiction—remains unchanged and indeed may well be intensified. For that very reason, a lawful attempt to create alienage diversity must be viewed differently and assessed more carefully than an attempt to create an out-of-state diversity.

It has been said, of course, that this element of prejudice or reasonable fear of prejudice has been overdrawn and that

[4] "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on the subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states." *Bank of the United States v. Deveaux*, 5 Cranch 61, 87 (per Marshall, C.J.).

"the social and economic incentives to interstate movement and business today are so great as to override any risk of injustice in state courts."[5] And it has been suggested that none of the significant prejudices which beset our society today begin or end when a state line is traversed. Yet even those who hold such views still concede that "the bias which was formerly thought to operate against out-of-staters as such seems still to exist to some degree with respect to persons from a more distant part of the country" and that "diversity jurisdiction thus may give protection from real or imagined prejudice against persons who are indeed out-of-staters."[6]

Such prejudice or bias as still exists with respect to out-of-state persons from "a more distant part of the country" must be deemed even more pronounced as to parties of an alien or out-of-the-country status. It is that presumed prejudice, or the appearance of such prejudice, that underlies lawful attempts to bring about the requisite elements for invoking federal jurisdiction under § 1332(a)(2). And since that prejudice cannot be avoided by remanding the alien parties to state courts, as it can be avoided by remanding truly in-state parties to their own state courts, the efforts to invoke federal alienage jurisdiction by assignment or otherwise should be viewed differently if not more tolerantly. Moreover, to the extent that the statutory and judi-

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[5] American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, Proposed Final Draft No. 1, p. 52 (April 19, 1965).

[6] *Ibid.*, p. 53. The American Law Institute study also suggests (p. 54) that this risk of prejudice should be considered not as a separate problem but rather as one aspect of the possible shortcomings of state justice. "One such shortcoming is that the state venue provisions often localize the place of trial in small constituencies. In these circumstances justice is likely to be impeded by the provincialism of the local judge and jury, the tendency to favor one of their own against an outsider, and the machinations of the local 'court house gang.' These phenomena are not isolated matters, but ones which are constantly experienced by trial lawyers all over the country."

cial proscriptions against so-called manufactured diversity jurisdiction are dictated by a fear that the dockets of the federal courts would otherwise "be crowded with suits of which neither the framers of the Constitution nor Congress ever intended they should take cognizance," *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 343, that fear can have little if any realization with respect to suits involving one or more aliens. Such suits constitute but a minute fraction compared to those between citizens of the same state whose controversies might well inundate the federal courts were the existing proscriptions lifted.

Thus the repeated admonitions against efforts to create federal diversity jurisdiction stem from the fact that most of that jurisdiction trenches upon the jurisdiction of the state courts. As Mr. Justice Frankfurter said for the Court in *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 76-77, "The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts,' in order to keep them free for their distinctive federal business. . . . 'The policy of the statute [conferring federal diversity jurisdiction] calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution . . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'"

But suits between aliens do not partake of those matters that intrinsically belong to the state courts, and the assertion of federal jurisdiction cannot trench upon the jurisdiction of the state courts as in the case of suits between citizens of different states. For practical and conceptual pur-

poses, different considerations are at stake in efforts to create alienage diversity by lawful means.

None of the precedents in this Court have dealt with attempts to create alienage jurisdiction under § 1332(a)(2). Rather they have dealt exclusively with efforts to create interstate diversity jurisdiction under what is now § 1332(a)(1). In that sense, therefore, this case is one of first impression in this Court.

2. A motive to create or manufacture diversity does not per se oust a federal court of jurisdiction.

It has often been fashionable to assume that all efforts to create or manufacture federal diversity jurisdiction are or should be condemned *per se*. But that assumption is not justified either by the theory of federal diversity jurisdiction or by the decisions of this Court. Indeed, the motive to create such a jurisdiction becomes entirely irrelevant if the factors creating that jurisdiction are in themselves lawful and proper.

The instances where jurisdiction may lawfully be created or manufactured are legion. Even the original jurisdiction of this Court may be created by a lawful transfer of a cause of action to a State. Thus in *South Dakota v. North Carolina*, 192 U.S. 286, South Dakota was permitted to invoke the original jurisdiction of this Court to compel North Carolina to honor certain bonds originally issued to individual owners. Those owners, barred by the Eleventh Amendment from suing North Carolina to compel payment, made an irrevocable gift of ten of their bonds to South Dakota "under a not unreasonable expectation that South Dakota would bring an action against North Carolina to enforce these bonds, and that such action might enure to his benefit as the owner of other like bonds." 192 U.S. at 310. This Court not only entertained South Dakota's complaint but gave judgment to South Dakota for the value of the ten bonds, stating that "the motive with which a gift is made,

whether good or bad, does not affect its validity or the question of jurisdiction." 192 U.S. at 310. And the Court relied in part upon Chief Justice Marshall's statement in *McDonald v. Smalley*, 1 Pet. 620, 624, a case involving a transfer of land in the belief that its title would be sustained by a federal court, whereas it would not be sustained in a state court. The Chief Justice there said:

> "The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a right to act upon them. A court cannot enter into them when deciding on its jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit are citizens of different states."

Time and again, and in a variety of contexts, this Court has reiterated the irrelevance of a motive to create jurisdiction to the actual determination of jurisdiction. In *Williamson v. Osenton*, 232 U.S. 619, the Court, through Mr. Justice Holmes, gave an affirmative answer to a certified question whether a plaintiff could gain access to a federal court in West Virginia where it was agreed that she had left West Virginia and gone to Virginia "with the intention of making her home in that state for an indefinite time in order that she might institute this suit against the defendant" on diversity grounds. Mr. Justice Holmes there said that "the motive for the change was immaterial" and that "the plaintiff had a right to select her domicile for any reason that seemed good to her." 232 U.S. at 625. Cf. *Morris v. Gilmer*, 129 U.S. 315 (access to federal court denied where party planned to move back to former home after termination of lawsuit).

A motive to create or manufacture diversity jurisdiction has likewise been deemed irrelevant where diversity resulted from dissolving a corporation and transferring all its assets to a new corporation organized under the laws of another state. Thus in *Black and White Taxicab Co. v. Brown and*

Yellow Taxicab Co., 276 U.S. 518, 524-525, in a much maligned but still authoritative opinion,[7] this Court held that the conceded motives of creating diversity jurisdiction

> ". . . which induced the creation of respondent [under Tennessee law] to become successor to its Kentucky grantor and take a transfer of its property have no influence on the validity of the transactions which are the subject of the suit. The succession and transfer were actual, not feigned or merely colorable. In these circumstances, courts will not inquire into motives when deciding their jurisdiction. *McDonald v. Smalley*, 1 Pet. 620, 624. It is enough that respondent is the real party in interest. *Smith v. Kernochen*, 7 How. 198, 216. The incorporation of respondent or its title to the business and contract in question is not impeached. Cooperation between it and the railroad company to have the rights of the parties determined by a Federal court was not improper or collusive within the meaning of § 37."

Attempts to create diversity jurisdiction by the bona fide transfer of land, contracts or other forms of property have consistently been sustained. In 1895 this Court in *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 336, summarized the prior decisions on this point as follows:

> "All of them concur in holding that the privilege of a grantee or purchaser of property, being a citizen of one of the states, to invoke the jurisdiction of a circuit court of the United States for the protection of his rights as against a citzien of another state—the value of the matter in dispute being sufficient for the purpose—cannot be affected or impaired merely because of the motive [to confer or create

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[7] "This decision has been the target of universal condemnation, as the worst example of abuses of diversity possible under the rule of *Swift v. Tyson* . . . but it is still treated as authoritative in *Corabi v. Auto Racing, Inc.*, C.A. 3d, 1959, 264 F.2d 784." Wright, *Federal Courts* 86, fn. 17 (1963).

> federal diversity jurisdiction] that induced his grantor to convey, or his vendee to sell and deliver, the property, provided such conveyance or such sale and delivery was a real transaction by which title passed without the grantor or vendor reserving *or having* any right *or power* to compel or require a reconveyance or return to him of the property in question. We adhere to that doctrine." [Emphasis in original.]

And in a later summarization in 1933 in *Bullard v. Cisco*, 290 U.S. 179, 188-189, this Court said:

> "With one accord prior decisions of this Court show that the right of a transferee of corporate bonds and coupons, payable to bearer, to sue in a federal court, notwithstanding a disability of his transferrers in that regard, turns on the nature of the transfer—whether it be real or only a colorable device to enable the transferrers, through the favor and name of the transferee, to invoke a federal jurisdiction which they could not invoke in their own right."

While somewhat different considerations are involved in efforts to defeat rather than create federal diversity jurisdiction, there never having been any statutory policy proscribing any type of attempt to destroy such jurisdiction (see Note, *Devices to Avoid Diversity Jurisdiction*, 44 Harv. L. Rev. 97 (1930)), the Court has emphasized the irrelevance of such motive in sustaining these attempts. And it has done so in partial reliance on the basic doctrine respecting the irrelevance of motive established in cases involving efforts to create jurisdiction. Thus in the leading case of *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, involving the appointment of an administrator of the same state citizenship as the other party to the suit in order to prevent removal to a federal court, the Court stated (284 U.S. at 189-190):

> "But it is clear that the motive or purpose that actuated any or all of these parties in procuring a lawful and valid appointment is immaterial upon

> the questions of identity of diversity of citizenship. To go behind the decree of the probate court would be collaterally to attack it not for lack of jurisdiction of the subject matter or absence of jurisdictional facts, but to inquire into purposes and motives of the parties before that court when, confessedly, they practiced no fraud upon it. The case falls clearly within the authorities announcing the principle that in a removal proceeding the motive of a plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined. While those cases involve a somewhat different situation,—that where a plaintiff joins defendants in order to avoid federal jurisdiction,—they are in principle applicable to the present case, where it is claimed a plaintiff was procured for the same purpose . . . The facts disclosed in this record fall far short of proof of actual fraud such as was held sufficient to justify removal in *Morris v. Gilmer*, 129 U.S. 315; *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U.S. 327 . . ."

See also *Mexican Central R. Co. v. Eckman*, 187 U.S. 429; *Chappedelaine v. Dechaneau*, 4 Cranch 306. This principle of the irrelevance of motive in the lawful appointment of an administrator or guardian has been followed by a majority of the lower federal courts in permitting the creation of diversity jurisdiction through the device of securing the appointment of an out-of-state representative.[8] See, in gen-

[8] See *Lang v. Elm City Construction Co.*, 324 F.2d 235 (C.A. 2); *Stephan v. Marlin Firearms Co.*, 325 F.2d 238 (C.A. 2); *County of Todd, Minn. v. Loegering*, 297 F.2d 470 (C.A. 8); *McCoy v. Blakely*, 217 F.2d 227 (C.A. 8); *Erwin v. Barrow*, 217 F.2d 522 (C.A. 10); *Jaffe v. Phila. and Western R.R. Co.*, 180 F.2d 1010 (C.A. 3); *Fallat v. Gouran*, 220 F.2d 325 (C.A. 3); *Corabi v. Auto Racing, Inc.*, 264 F.2d 784 (C.A. 3).

The last three cited opinions of the Third Circuit were either overruled or disapproved by that court in two recent decisions rendered on October 2, 1968, *McSparran v. Weist* and *Esposito v. Emery*. A petition for certiorari is now pending before this Court, seeking review of the *McSparran* decision. No. 772, Oct. Term, 1968.

eral, Cohan and Tate, *Manufacturing Federal Diversity Jurisdiction by the Appointment of Representatives: Its Legality and Propriety*, 1 Villanova L. Rev. 201 (1956).

Finally, this Court has sustained federal diversity jurisdiction as to a class action where the necessary diversity was achieved by carefully naming as representatives of the class only those whose citizenship differed from that of the opposing party, omitting those representatives whose citizenship was identical with that of the opposing party. *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356. The fact that the representatives were named with a deliberate eye toward creating diversity was not even deemed worthy of consideration. The same principle has been followed in stockholders' derivative suits where the only named stockholders are chosen so as not to include any who are citizens of the same state as the corporation or other named defendants. See Wright, *Federal Courts* 87 (1963).

In sum, the controlling principle repeatedly enunciated and followed by this Court is that the right of a party to invoke the diversity jurisdiction of a federal court cannot be affected or impaired merely because of a motive to create the jurisdictional conditions necessary to such invocation. If the device utilized to create those conditions be lawful and bona fide, the motivation becomes quite irrelevant to the determination of federal diversity jurisdiction. And it makes no difference what form the device may take, be it a sale, a transfer, a gift, an assignment, a court appointment, a change of domicile, or a selective naming of parties to the suit.

It follows, therefore, that the intention and motive in this case to create alienage diversity through the assignment of the agreement of May 30, 1959, and the cause of action thereunder cannot *per se* operate to oust the federal district court below of jurisdiction. As will become apparent hereinafter, that assignment was made for a valuable consideration so as to terminate the pecuniary interest of the assignor in the subject matter of the transfer. In such circumstances, "it makes no difference that by such transaction the trans-

feree acquired the advantage of suing in the federal court." *Cross v. Allen*, 141 U.S. 528, 533. Nor can it be said that such an assignment or such a motivation brings this case "within the class of collusive cases" so as to "require its dismissal at the hands of the federal court, on jurisdictional grounds." *Ibid.*, 533.

3. The existence of a valid assignment has been established by (a) the controlling law of Texas, (b) the findings of the jury, and (c) the determination of the trial judge.

The validity of the assignment in this case becomes a critical element in the establishment of the alienage jurisdiction invoked by the petitioner Kramer. That validity has been made evident by the relevant state law and affirmed by the findings of the jury and the determination of the District Court. And the assignment was of a contract that, being binding on "assigns," obviously contemplated the possibility of being assigned. Pl. Ex. 1.

The assignment itself, dated September 21, 1964, provided that Panama and Venezuela Finance Company did assign, sell and convey to the petitioner Kramer "all of our right, title and interest," including all actions, causes of action and claims, arising out of the original tripartite agreement of May 30, 1959. App. 13. The assignment further recited that the consideration consisted of "One Dollar ($1.00) and other good and valuable consideration, receipt of which is hereby acknowledged." App. 13. No rights in the original agreement were reserved to Panama. This assignment was duly executed by Panama and delivered to Kramer's counsel. App. 17.

The collateral agreement executed simultaneously with the assignment referred to the fact that Panama "for valuable consideration" had "irrevocably assigned, sold and conveyed to Clayton S. Kramer all of its right, title and interest under and arising out of" the original tripartite agreement. App. 15. And this collateral agreement indicated that "the said Clayton S. Kramer is now the sole owner of any action

or causes of action derivative therefrom, with the independent right of management, control and prosecution thereof, and does hereby indemnify and hold harmless the Panama and Venezuela Finance Company free from cost or expense that has or may arise out of the prosecution of any demand or suit on said contracts." App. 15. The 95 per cent "bonus" was made payable to Panama only after Kramer had assumed the management, control and burden of any legal action to enforce the assignment agreement, had obtained a recovery, and had paid the appropriate attorney fees and expenses.[9]

Both the assignment and the collateral agreement were expressly made subject to the laws of the State of Texas, it being specified in each document that if any question arose as to the validity or meaning of the respective instrument "the laws of the State of Texas" should control. App. 14, 16.

The controlling "laws of the State of Texas" fully sustain the validity and effectiveness of this transfer to Kramer of all of Panama's interest in the original tripartite agreement.[10] At the time of this assignment in 1964, Texas

[9]According to Kramer's testimony, this 95 per cent "bonus" was arranged because "I did not want to put up any cash to purchase the claim" and "I would prefer not to borrow a large sum of money for it." App. 45. He did not expect Panama just to "take it all for the $1 plus your promises to prosecute the claim, plus your indemnity agreement" and, after discussing the matter with his counsel, Kramer decided that "one way to do it—was by paying a bonus." App. 57. The "bonus" was thus viewed as a form of deferred consideration for the assignment, in lieu of an immediate and outright cash payment from Kramer's own funds or from borrowed funds.

[10]Generally, the question of the validity of an assignment is a question of local law. *Blair v. Commissioner*, 300 U.S. 5, 9. And in determining the validity of an assignment in the context of jurisdictional problems, federal courts look to relevant state law. See *American Fidelity & Casualty Co. v. All American Bus Lines*, 179 F.2d 7, 10 (C.A. 10); *McWhirter v. Otis Elevator Co.*, 40 F.Supp. 11 (D.C.S.C.); *Ishmael v. City Electric of Anchorage*, 91 F.Supp. 688 (D.C. Alas.); *Petrikin v. Chicago, R.I. & P.R. Co.*, 15 F.R.D. 346 (D.C. Mo.). See also *Martineau v. City of St. Paul*, 172 F.2d 777 (C.A. 8).

provided by statute (Art. 569, Vernon's Ann. Tex. Civil Stat.) that "The obligee or assignee of any written instrument not negotiable by the law merchant, may, by assignment transfer all his interest therein to another." See *Central Power & Light Co. v. Purvis*, 67 S.W.2d 1086 (Tex. Civ.App.); *Dittman v. Model Bakery*, 271 S.W. 75 (Tex. Comm.App.). And further, by the terms of relevant Texas statutory law (Art. 570, Vernon's Ann. Tex. Civil Stat.), "The assignee of any instrument mentioned in . . . [Art. 569] may sue thereon in his own name." See *Pecos & N.T.R. Co. v. Porter*, 156 S.W.2d 267 (Tex.Civ.App.); *Young v. Bank of Miami*, 161 S.W. 436 (Tex.Civ.App.).[11]

As to the Texas rule respecting the validity of an assignment, Texas courts have consistently held that where the parties intend to transfer the rights of the assignor and where delivery of the instrument, either actual or symbolic, is accomplished, a completed and valid assignment has been made. *Ross v. Smith*, 19 Tex. 171; *Neely v. Grayson County National Bank*, 61 S.W. 559 (Tex.Civ.App.). Such an intent and delivery are sufficient to transfer title and to evidence a bona fide assignment even though the assignee may have paid no consideration. *Pearce v. Wallis, Landes & Co.*, 124 S.W. 496, 497 (Tex.Civ.App.); *Kenedy Town & Improvement Co. v. First National Bank*, 136 S.W. 558, 561 (Tex. Civ.App.). In the instant case, of course, there was a coalescence of an intent to assign, actual consideration and a delivery of the assignment instrument.

Texas thus follows the general rule that "Lack of consideration for the assignment is immaterial . . . for the law is

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[11] In 1966, more than a year after the assignment in question, Articles 569 and 570, quoted above, were among those repealed by the adoption by the Texas Legislature of the Uniform Commercial Code, which was in turn repealed in 1967 and replaced by the Business and Commerce Code. Such repeal did not affect the validity of any assignment made prior to the adoption of either Code and, indeed, there has been no change in the principles embodied in Articles 569 and 570. See Vernon's Legislative Session Law Service Pamphlet No. 6 (1967).

well settled that the assignment of an entire chose in action is valid and irrevocable after delivery though made without consideration." *Globe Indemnity Co. v. Puget Sound Co.*, 149 F.2d 805, 809 (C.A. 2); see also *Chase National Bank v. Sayles*, 11 F.2d 948 (C.A. 1). As expressed in the leading Texas decision on this point, *Hughes v. Dopson*, 135 S.W.2d 148, 149-150 (Tex.Civ.App.):

> "The notes had been duly assigned to appellant by the receiver of the bank and he had a right to bring and maintain suit thereon regardless of the amount of consideration paid by him or, in fact, whether or not he had paid anything at all as consideration therefor. By virtue of the assignments he became the legal owner and holder of the notes.
>
> "There was neither pleading nor evidence tending to question the validity of the assignments and the law is well established that, by virtue of the assignments, regardless of whether he paid a valuable consideration for the notes or not, appellant had the right to maintain the suit and the question of whether he paid a valuable consideration was wholly immaterial. Durst v. Swift, 11 Tex. 273; Continental Oil & Cotton Co. v. E. Van Winkle Gin & M. Works, 62 Tex.Civ.App. 422, 131 S.W. 415."

It is also well established by Texas case law that an obligor under a contract that has been assigned, such as the respondent Caribbean Mills, cannot and should not be concerned with the amount of consideration, if any, that passed between the assignor (Panama) and the assignee (Kramer). The theory of this principle is that, regardless of the value paid for the assignment, the obligor still owes whatever is due under the assigned contract and he can still assert against the assignee any defense he may have to the contract claim; hence the obligor can suffer no possible legal harm by being foreclosed from questioning the sufficiency of the consideration for the assignment. Thus in *F. H. Vahlsing, Inc. v. Hartford Fire Insurance Co.*, 108 S.W.2d 947, 951 (Tex.Civ. App.), the court ruled:

> "An assignee of a chose in action who sues the assignor in respect thereof must show that a consideration passed. This is upon a principle well settled in the law of contracts. But if the action is against the original obligor, the assignee may recover without such a showing, consideration for the transfer being no affair of the obligor, for it can make no difference to him whether recovery is by the assignor or by the assignee."

This principle has been reiterated many times by Texas courts, dating back as far as 1854 when *Durst v. Swift*, 11 Tex. 273, held that it was not necessary for the assignee in a suit against the obligor to prove the consideration paid for an assignment even though the assignment had not been executed under seal (a prime requirement in those early days). In *Quinn v. McCurdy*, 187 S.W.2d 595, 597 (Tex. Civ.App.), the court ruled that "The suit being against the obligor, the assignee of the chose in action was not required to show consideration for the assignment," despite the obligor's contention that "the evidence shows no consideration for the assignment." In *General Office Service Co. v. Ledbetter*, 221 S.W.2d 932 at 932 (Tex.Civ.App.), it was repeated that "Since the appellee was the original obligor, the question as to the consideration for the assignment was immaterial." And in *Glass v. Carpenter*, 330 S.W.2d 530, 537 (Tex.Civ.App.), it was again said that "In a suit by the assignee on a claim against the obligor, . . . the defense of lack of consideration for the assignment [cannot] be urged by the obligor in a suit on the assigned claim."

Texas law thus makes plain that the assignment in this case was valid and binding upon the execution and delivery of the assignment instrument, it being the intent of both assignor and assignee that all of Panama's rights in the assigned contract be irrevocably transferred to the petitioner Kramer. That such generative facts did take place is obvious not only from the documentary record but from the jury's affirmative findings, from a preponderance of all the evidence, that Panama did assign all of its $165,000 interest

in the tripartite agreement to Kramer. App. 78 (Special Issue Nos. 2 and 2-a). The District Court's considered determination that the assignment "was good on its face" is confirmatory of its compliance with Texas law. App. 12.

The assignment, moreover, was supported by adequate consideration, even assuming such consideration were required under Texas law to validate the assignment. The assignment itself recited that it was supported by a consideration amounting to "One Dollar ($1.00) and other good and valuable consideration."[12] App. 13. That dollar was in fact paid. App. 47. But the one dollar was not the sole consideration. As specified in the collateral agreement, Kramer also agreed to assume the management, control and burden of any lawsuit to enforce the assigned contract and to indemnify and hold harmless the assignor from any obligations arising out of the enforcement of the contract. And there was the deferred "bonus" payment to Panama from the net proceeds of any recovery. The sum of these various items constituted more than adequate consideration for the assignment.

But if Texas law is to be respected in this diversity litigation in regard to the legality of an assignment executed under "the laws of the State of Texas," respect must be accorded the firm Texas rule that an intent to transfer rights, when accompanied by delivery of an assignment instrument, results in a valid and complete assignment even where no consideration is paid. And particularly in a suit between an assignee and the original obligor, Texas law makes the question of consideration or its adequacy entirely irrelevant and indeed not even open to inquiry. It thus becomes idle to speculate whether the one dollar or the other specified items constituted adequate consideration or whether the deferred "bonus" of 95 per cent of the net

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[12] See *City of Eufaula, Alabama v. Pappas*, 213 F.Supp. 749, 750 (D.C. Ala.): "While it is true that the consideration for the transfer to Zafero P. Paterson was the sum of $1, this under the law of Alabama suffices to support the transfer."

recovery drained the transaction of true consideration. To give the assignment the same effect it would be given by a Texas court is to recognize the total validity of this assignment.

The conclusion is inescapable that (1) as the trial judge here found, the assignment "was good on its face," (2) as the jury here found, Panama intended to, and did in fact, transfer all of its $165,000 interest in the tripartite agreement to Kramer, and (3) as Texas law makes clear, the assignment was valid and effective upon its execution and delivery, even without regard to the adequacy of the consideration. Respect for Texas law as well as for the findings of judge and jury permits no other rational conclusion. The Fifth Circuit's failure to adopt that conclusion cannot be justified.

4. The execution of an assignment valid under state law, even when done to create diversity jurisdiction, is not collusive or improper within the meaning of 28 U.S.C. § 1359.

It is with the foregoing considerations in mind that the ultimate question in this case must be faced: can an assignment of a contract and a cause of action thereunder, which assignment is valid under controlling state law and yet was motivated in substantial part by a desire to create alienage diversity, be deemed collusive or improper within the meaning of 28 U.S.C. § 1359? Section 1359, it will be recalled, bears the heading "Parties collusively joined or made" and provides that

> "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

An appreciation of the thrust of § 1359 must begin with an understanding of its historical antecedents. Its origin is to be found in the famous assignee clause of the Judiciary Act of 1789, Sec. 11, 1 Stat. 79, which was designed to ex-

clude from federal courts virtually all suits by assignees of promissory notes or other choses in action unless such suits could have been prosecuted in those courts by the assignors as if no assignments had been made. More specifically, this clause provided that no district or circuit court was to have

> "... cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

With changes in language, this assignee clause remained a part of federal law until 1948, when it was dropped in the course of revising the Judicial Code.[13] The successive amendments to the clause in the intervening years had resulted in an increased amount of "obscure phraseology" and it became known as a "jumble of legislative jargon."[14] A large and highly technical body of decisions had arisen, attempting to sift through the muddled statutory language. The most prominent difficulty with the clause was its indiscriminate outlawry of all suits on assigned claims within its scope, including those where the assignment itself was entirely bona fide; at the same time, the clause did not bar

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[13] In its final version, § 41(1) of the 1940 edition of Title 28 of the United States Code, this assignee clause provided that "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

[14] The quoted phrases appeared in a Comment, *Chaos of Jurisdiction in the Federal District Courts*, 35 Ill. L. Rev. 566, 569, 570 (1941), and were referred to approvingly in the Reviser's Notes to § 1359 of the 1948 Judicial Code. See also Dobie, *Jurisdiction of the United States Courts as Affected by Assignment*, 6 Va. L. Rev. 553 (1920).

suits based upon non-bona fide assignments that fell outside the highly artificial boundaries set by the statute. See Wright, *Federal Courts* 85 (1963); 3A *Moore's Federal Practice* 201-205 (2d ed., 1967).

In the meantime, at about the three-fifths mark in the lifespan of the assignee clause, the Act of March 3, 1875, 18 Stat. 470, became effective. In Sec. 1 of that Act, Congress once again amended and re-promulgated the assignee clause. But Sec. 5 of the Act contained an entirely new and independent approach to the problems involved in efforts to invoke the diversity jurisdiction of federal courts. That section provided that:

> "If, in any suit commenced in a Circuit Court or removed from a State Court . . . it shall appear to the satisfaction of the Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a suit or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this Act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the State Court from which it was removed, as justice may require . . ."

This provision remained on the federal statute books in substantially the same form until the 1948 revision of the Judicial Code, being last known as Sec. 80 of the 1940 edition of Title 28 of the United States Code.

The 1948 revision of the Judicial Code, out of which the present § 1359 was born, made several significant changes in the pre-existing statutory patterns:

(1) The assignee clause as such was dropped completely.[15]

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[15] The Reviser's Notes state that the assignee clause had become "a jumble of legislative jargon." Reference was made to this Court's

(2) Also omitted was the first portion of Sec. 5 of the 1875 Act, known in 1948 as Sec. 80 of Title 28, referring to the dismissal of a suit whenever it appears "that such suit does not really and substantially involve a suit or controversy properly within the jurisdiction" of the federal court.[16]

(3) Retained and recast into the present § 1359 was the second portion of Sec. 5 of the 1875 Act, known to the revisers as Sec. 80 of Title 28, relative to the dismissal of a suit whenever it appears that the parties have been improperly or collusively made or joined for the purpose of creating a case within the jurisdiction of the federal court. The words "by assignment or otherwise" were added to make plain the broad scope of "collusive" devices. In selecting this provision for retention in lieu of the other then existing provisions, the Reviser's Notes state that "Its coverage against collusive jurisdiction is unlimited, and its approach is direct."

From the bare bones of this statutory reshuffling, one critical factor emerges that dispels the rather common misconception that the purpose and effect of § 1359 are to outlaw all efforts to create diversity jurisdiction through assignments. It has been said, by a most respected authority, that since the assignee clause "often defeated diversity jurisdiction without regard to the motivation of jurisdiction," the 1948 revisers felt that the proper principle "should be to deny diversity only where the assignment was

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statement in *Sowell v. Federal Reserve Bank*, 268 U.S. 449, 453, that the purpose and effect of the clause, "at the time of its enactment, were to prevent the conferring of jurisdiction on the Federal courts, on grounds of diversity of citizenship, by assignment, in cases where it would not otherwise exist." The Reviser's Notes state that this purpose "is better served by substantially following said section 80."

[16]The Reviser's Notes state simply that this provision was "omitted as unnecessary" since "Any court will dismiss a case not within its jurisdiction when its attention is drawn to the fact, or even on its own motion." Hart and Wechsler, in *The Federal Courts and the Federal System* 721 (1953), have posed this question about this particular omission: "Were the revisers well-advised in what they did?"

motivated by the creation of diversity jurisdiction" and that "Accordingly, the assignee clause was repealed and former § 80 was modified expressly to include assignments." 3A *Moore's Federal Practice* 151 (2d ed., 1967).

But there is not one word in the Reviser's Notes to indicate that the revisers felt that diversity should be denied whenever or solely because an assignment was motivated by the creation of such jurisdiction. On the contrary, their prime concern was to make certain that "collusive" attempts to create diversity jurisdiction would be proscribed; and to that end they chose to perpetuate that portion of the 1875 Act that withheld jurisdiction only where an attempt was made to invoke diversity by "improperly or collusively" making or joining a party.

In other words, § 1359 is merely a continuation of the pre-revision doctrine that diversity jurisdiction is not to be denied merely because the device making diversity possible was motivated by a desire to create such jurisdiction. Had the framers of § 1359 intended to outlaw naked attempts to create diversity, by assignment or otherwise, they could have done so simply by omitting the words "improperly or collusively" from the recodification. See comments of Chief Judge Biggs in *Corabi v. Auto Racing, Inc.*, 264 F.2d 784, 788 (C.A. 3). Instead, they copied the long-existing prohibition of *collusive* or *improper* means to achieve diversity. Thus standing alone and apart from any collusive implementation, a motive to create diversity through an assignment or other device is not the *sine qua non* of § 1359. Cf. *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 153.

Still another significant factor emerges from the 1948 rearrangement of the diversity mosaic. The revisers expressly thought it unnecessary to retain the provision of the 1875 Act that had dictated the dismissal of an action "not really and substantially involving a dispute or controversy within the jurisdiction" of the court. But unnecessary or not, those words were omitted from § 1359. And they were words which shed much meaningful light upon the

"improper" and "collusive" terminology as used prior to 1948. As was said recently by the Third Circuit,[17] in attempting to find specific content to give to the words "improperly" and "collusively" as now used in § 1359,

> "While the preliminary words of § 37 [the 1911 version of Sec. 5 of the 1875 Act] no longer appear in § 1359, we believe they give content to its otherwise indefinite and ambiguous words 'improperly' or 'collusively'. They say in effect that a nominal party designated simply for the purpose of creating diversity of citizenship, who has no real or substantial interest in the dispute or controversy, is improperly or collusively named."

It is dubious whether such deliberately omitted language can properly be used to cast light on words still remaining in effect. What is significant, however, is the implicit recognition by the Third Circuit that in the absence of the excised words of Sec. 5 of the 1875 Act, the terms "improperly" and "collusively" can no longer be considered as necessarily incorporating the notion of a device whereby a nominal party who has no real or substantial interest in the controversy is designated for the purpose of creating diversity.[18] As the revisers themselves recognized, a federal court can always dismiss a case that is not within its jurisdiction or that does not involve a party having a real or substantial interest in the controversy. But, by relegating the real and substantial controversy concept to the inherent powers of federal courts, the revisers may well have effectively removed that concept from the present reach of the "improperly or collusively" language.

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[17] *McSparran v. Weist*, as yet unreported, No. 16793, C.A. 3, Oct. 2, 1968, now pending before this Court on petition for a writ of certiorari, No. 772, Oct. Term, 1968. See footnote 8, *supra*. The quotation from the opinion appears at page 28 of the appendix to the petition in No. 772.

[18] To repeat the query of Hart and Wechsler, see footnote 16, *supra*, "Were the revisers well-advised in what they did?"

In thus restructuring § 1359, the revisers can be said to have rendered somewhat impotent, for § 1359 purposes, the precedential value of certain pre-revision decisions of this Court which had considered the collusive concept in the context of the now-omitted language concerning real and substantial controversies. In *Miller & Lux v. East Side Canal & I. Co.*, 211 U.S. 293, for example, the formation of a new out-of-state corporation for the sole purpose of invoking diversity jurisdiction was deemed "feigned or merely colorable" and hence collusive where the lower court had already found that the suit "did not really and substantially involve a dispute or controversy within the jurisdiction of that court." 211 U.S. at 298.

It is within this historical and narrowed framework of § 1359 that the search must now be made for the proper content of the concepts of impropriety and collusiveness, at least to the extent made necessary by the circumstances of this case. By common consent, those concepts as used in § 1359 appear to be ambiguous and indefinite. Lower courts have differed widely as to their meaning and scope. As the Tenth Circuit said in *Bradbury v. Dennis*, 310 F.2d 73, 74-75:

> "Our difficult problem is one of ascertaining their true jurisdictional meaning at the time of the revision. As words used to delineate jurisdiction, they ought to be cast in black and white, but we find them in the decisional gray zone. Though words of general import, and no strangers to the law, they are nevertheless words of art when used to define or delineate federal court jurisdiction. They are used in the disjunctive and are evidently intended to define different and varying jurisdictional barriers."

To determine whether an assignment or transfer is "improper" or "collusive" it is not enough to turn to such labels as "fictitious or pretended," *Miller & Lux v. East Side Canal & I. Co.*, 211 U.S. 293, 304, or "nominal and colorable," *Smith v. Kernochen*, 7 How. 198, 216, or "a

mere contrivance, a pretense," *Detroit v. Dean*, 106 U.S. 537, 541. What "we need to know [is] by what standards we shall determine when an assignment or transfer is 'fictitious,' 'colorable' or 'spurious,' hence improper or collusive." *Bradbury v. Dennis, supra*, 75.

But out of this welter of confusion and labels emerge certain statutory considerations that can be translated into meaningful content for the phrase "improperly or collusively," considerations that also demonstrate that the assignment in this case was not of the type that § 1359 was meant to encompass.

(1) As is true with respect to any statute, resort must first be had to the words of § 1359 itself, the words "improperly or collusively." Those words, "[w]hatever the reason," must be presumed to "mean what they say." *Singer v. United States*, 323 U.S. 338, 346.

The word "improper" or "improperly," as Chief Judge Biggs noted in his *Corabi* opinion, 264 F.2d at 788, clearly connotes impropriety and is defined by Webster to mean "Not suited to the circumstances, design, or end; not appropriate, fit, or congruous; as, an *improper* medicine; *improper* dress."

As to the term "collusive" or "collusively," this Court in *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 190,[19] defined the concept of collusion as implying "the existence of fraud of some kind, the employment of fraudulent means or of lawful means for the accomplishment of an unlawful purpose." And the Court also resorted to the Bouvier definition of collusion as "an agreement between two or more persons to defraud a person of his rights by the forms of

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[19] While the Court in the *Dickerman* case was directly concerned with defining collusion in the context of the nonpayment of an allegedly collusive judgment operating as a mortgage default, the Court specifically analogized the definition problem before it to that involved in determining whether a transaction is collusive so as to oust a federal court of jurisdiction. 176 U.S. at 191-192.

law, or to obtain an object forbidden by law." See also *United States v. Johnson*, 319 U.S. 302, 305 (a collusive suit "does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated"). And as Chief Judge Biggs stated in *Corabi*, 264 F.2d at 788, the word "collusion" is generally employed "to indicate an illegal agreement or understanding between opposing sides of a litigation rather than to an arrangement effected by one side of the sort at bar."[20]

Given the plain meaning of these statutory words, the assignment in this case cannot be described as a device for "improperly or collusively" making the petitioner Kramer a diverse party plaintiff. The assignment, as has been demonstrated, fully complied with state law and no effort has been made in this case to impeach the validity of that assignment. The fact that one of its purposes was to create diversity cannot, under the repeated decisions of this Court, serve to create an object forbidden by law. There was no element of impropriety in the assignment transaction, both the assignor and the assignee acting in what each conceived to be his best interests. Certainly they did not act, secretly or otherwise, to defraud the respondent Caribbean Mills of any of its rights or defenses. In short, as was said in *Black and White Taxicab Co. v. Brown and Yellow Taxicab Co.*, 276 U.S. 518, 525, "Co-operation between . . . [Panama and Kramer] to have the rights of the parties determined by a Federal court was not improper or collusive within the meaning of § 37 [now § 1359]."

(2) The concepts of collusion and impropriety, when viewed in light of the purpose and policy of § 1359, obviously convey strong overtones of fraudulent and illegal conduct by the parties involved. In referring to the 1875 prede-

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[20] "If we accept the dictionary definition . . . the word 'improperly' broadly covers any act or conduct deemed unsuited to the circumstances of the case, while the word 'collusively' is a stronger word with a more restricted meaning indicating a secret agreement for a bad purpose." *Bradbury v. Dennis*, 310 F.2d 73, 75 (C.A. 10).

cessor of § 1359, this Court has said that the withdrawal of jurisdiction dictated by the statute "was for the protection of the court as well as parties against frauds upon its jurisdiction; for as was very properly said by Mr. Justice Miller, speaking for the court, in *Barney v. Baltimore*, 6 Wall. 280, 288, such transfers for such purposes are frauds upon the court, and nothing more." *Williams v. Nottawa*, 104 U.S. 209, 211.

But a fraud perpetrated on a court implies something more evil than a lawful transaction by which "the transferee acquired the advantage of suing in the federal court." *Cross v. Allen*, 141 U.S. 528, 531. It implies some sort of fraudulent experiment upon the jurisdiction of the court, an experiment that might well subject the perpetrators to censure if not contempt. Such a fraud may be present, for example, where there is proof that a false or fictitious state of facts was submitted to the court or where there is an absence of a genuine adversary issue between the parties, without which a court may not safely proceed to judgment. See *United States v. Johnson*, 319 U.S. 302. Or the device used to create the necessary diversity may be illegal or fraudulent in its inception or contrary to relevant state law. None of those indicia of fraud is here present, however.

(3) The statutory notions of collusion and impropriety are plainly not applicable to a transaction that fully satisfies the controlling requirements of state law. To state that proposition is not to disparage the rule that federal courts are the exclusive judges of their own jurisdiction. *Missouri P.R. Co. v. Fitzgerald*, 160 U.S. 556. But when federal jurisdiction is to be weighed in terms of the collusive or fraudulent action of one of the parties, and when that collusion or fraud relates to the propriety of a transaction whose legality can be tested only by reference to state law, compliance with state law becomes not only relevant but dispositive of the collusion issue. Indeed, it was the sanction of state law underlying the corporate transactions in the *Black and White* case that permitted this Court to find

those transactions non-collusive. See *Bradbury v. Dennis*, 310 F.2d 73, 76 (C.A. 10). And in the instant case, the assignment transaction was so completely in compliance with applicable Texas law that no challenge to that transaction has ever been raised. Not even the Fifth Circuit could find any legal fault in the assignment.[21]

(4) In many of the pre-revision decisions of this Court, collusion or impropriety was premised upon a judicial determination from the record that a particular transaction was lacking in consideration or failed to transfer of all the transferor's right or interest in the subject matter or left the transferor in complete control of the federal court litigation. See, e.g., *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327; *Farmington Village v. Pillsbury*, 114 U.S. 138;[22] *Miller & Lux v. East Side Canal & I. Co.*, 211 U.S. 293; *Detroit v. Dean*, 106 U.S. 537; *Little v. Giles*, 118 U.S. 596.

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[21] It was said in *Bradbury v. Dennis*, 310 F.2d 73, 76 (C.A. 10), that "Certainly diversity jurisdiction should not be made to depend on whether some one can pick a legal flaw in the transaction by which jurisdiction is conferred. It should not be made to depend upon or await adjudication of the legality of the transaction under state law. All this means that the state of the law is left in the gray zone where we found it."

[22] The *Farmington* case involved certain bonds issued by a village, bonds that had been held invalid by the Maine courts. Thereafter some of the Maine bondholders transferred their coupons to a Massachusetts plaintiff under an arrangement by which the latter gave a promissory note for $500, payable in two years, "as a further consideration for said coupons." If he succeeded in collecting the full amount of the bonds he was to pay the original owers 50 per cent of the net amount collected above the $500. The Massachusetts transferee then brought suit in a federal court in Maine. The case came to this Court on special findings by the federal court below, there having been no jury and the judges below having certified a division of opinion among them. This Court found from the record that there had been no consideration paid for the bonds and that the original bondholders intended to keep control of the whole matter in their own hands "so that if the plaintiff failed to recover the money he could be released from his promise to pay." The case was found to be collusive and hence dismissable under Sec. 5 of the 1875 Act.

To the extent that such factors may be considered relevant in defining the "improperly or collusively" terminology of the modern § 1359, the record in this case, as had been shown, reveals (a) adequate consideration in the form of the one dollar, the independent management and control of the lawsuit, the indemnification promise, and the deferred 95 per cent "bonus," (b) an irrevocable assignment and conveyance of all of Panama's right, title and interest in the original tripartite agreement, and (c) sole ownership in the petitioner Kramer of the cause of action "with the independent right of management, control and prosecution thereof."

Of at least equal importance, however, is the fact that the jury and the trial judge, after consideration of all the facts of record (including the terms and the testimony concerning the collateral agreement), both concluded that a complete and effective assignment had been made to Kramer by Panama of all of its $165,000 interest in the tripartite agreement. This Court once said, with particular reference to Sec. 5 of the 1875 Act, that the statutory provision here in question "confers [on a federal court] a beneficial authority to be wisely exercised in defeating collusive and fraudulent experiments upon its jurisdiction; but the discretion it confers is judicial, proceeding upon ascertained facts according to rules of law, and subject to review for apparent errors." *Barry v. Edmunds*, 116 U.S. 550, 566. The court, in other words, must exercise "a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proven, and controlled by fixed rules of law," and those facts must be "made distinctly to appear on the record." *Ibid.*, at 559.

Adherence to that principle would mean that, in the administration of § 1359, great weight must be attached to the considered findings of the triers of fact and that it does not lie in the power of an appellate court to ignore those findings and to make its own *de novo* determinations as to such factual matters as the existence of consideration, the

intent to transfer and the actual transfer of interests, and the control of lawsuits; at least where, as here, there is substantial evidence to support the findings of the triers of fact.

In this respect, this case is unlike any of the pre-revision cases resolved by this Court. In none of them was there so complete a jury inquiry, aided by special interrogatories, into the critical facts upon which the ultimate determination as to "collusion" was to be based; nor in any of them was there an additional confirmatory determination by the trial judge. And most certainly none of those prior cases involved the action of an appellate court ignoring both the trial judge's determination and the jury findings and making its own determinations of fact—as the Fifth Circuit here did. For that reason alone, this case is unique, and significantly so.

The Fifth Circuit erred not only in its determination that the assignment was a collusive device within the meaning of § 1359 but also in its refusal to accord any respect or weight to the findings of either trial judge or trial jury.

CONCLUSION

For these various reasons, the judgment of the Court of Appeals for the Fifth Circuit should be reversed and the case remanded for further appropriate proceedings.

Should this Court disagree with that conclusion and decide to affirm the judgment below, the petitioner requests that such a ruling be made prospective in effect so as to avoid hardship to this petitioner. There has been no direct precedent under § 1359 involving the jurisdictional matters here at stake, particularly in terms of attempts to invoke alienage diversity. Petitioner reasonably believed that he had a right to invoke federal jurisdiction, a belief affirmed by the District Court, and a substantial expenditure of judicial time and energy ensued. A determination of the merits ensued after a full jury trial. To preserve that expenditure in this instance would be fair to both

parties who have participated in litigating the merits of the controversy and would permit any ruling by this Court to be fully effective as to future litigation.

Moreover, to remand the petitioner to his state court remedies, if any, would subject him to the risk of dismissal as to the installment claims under the contract that have accrued four years or more ago, Texas having a four-year statute of limitations on such claims (Art. 5527, Rev. Civil Stat. Tex.). The first of those installments accrued on June 1, 1962. App. 4. It was precisely to avoid this type of unfairness that the Third Circuit, in recently announcing a new rule prohibiting the creation of diversity jurisdiction through the appointment of a guardian, declared that its new rule was to be prospective only. That new rule, said the Third Circuit, "shall apply to all causes of action which arise after the date of the filing of this opinion," but as to causes of action arising prior to that date the new rule shall apply "only where the court finds in the circumstances of the particular case there is ample time and opportunity for the plaintiff to institute a new action in the state court and that no unreasonable burden will be imposed on the plaintiff by the dismissal of the federal action." *McSparran v. Weist*, as yet unreported, C.A. 3, October 2, 1968, now pending on petition for writ of certiorari, No. 772, Oct. Term, 1968.

The petitioner repeats, however, that the judgment below should be reversed *in toto*.

Respectfully submitted,

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December 1968.